LIM HUN SWEE

v.

MALAYSIA BRITISH ASSURANCE BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
RAMLY ALI JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NOS: P-03-125-2007, P-03-137(A)-2007, P-03-146-2007, P-03-172-2007 & P-02-624-2007]
27 MAY 2010

BANKRUPTCY: *Discharge - Appeal against - Whether discharge ought not be allowed - Whether fatal for DGI not to have prepared a full and complete report on bankrupt's conduct and affairs as required under s. 33 Bankruptcy Act 1967 - DGI's report brief and incomplete - Whether court could reject DGI's report and disallow discharge*

BANKRUPTCY: *Discharge - Application - Conduct of official assignee - Failure to produce competent report - Bankruptcy Act 1967, s. 31(1) - Whether sufficient to support application for discharge - Whether Bankruptcy Act 1967, s. 16(2) complied with - Whether Bankruptcy Act 1967, s. 33(6)(b), (f) & (m) contravened - Whether there was basis to allow discharge*

BANKRUPTCY: *Discharge - Discharge of bankrupt - Whether discharge proper as bankrupt paid only 1% of outstanding debt - Whether bankrupt committed offence under Bankruptcy Act 1967 - Report by Director General of Insolvency brief and incomplete - Whether discharge ought not be allowed - Whether court to consider interest of public commercial morality in deciding discharge applications - Bankruptcy Act 1967, s. 33*

BANKRUPTCY: *Official assignee - Duty of - Conduct - Failure to produce competent report - Whether sufficient to support application of discharge - Whether court may refuse to accept incomplete or incompetent report - Bankruptcy Act 1967, s. 31(1)*

On his own application, a receiving order and adjudication order were made against the bankrupt on 23 November 2000. Subsequently, on 3 June 2003, the bankrupt filed an application for an order of discharge under s. 33 of the Bankruptcy Act 1967 ('the Act'). To facilitate the determination of the said application three

reports pursuant to s. 33(3) of the Act 1967 were prepared by the Director-General of Insolvency ('DGI'). The Deputy Registrar granted a conditional discharge subject to the bankrupt being made to pay a sum of RM5,000 per month for a period of five years. Being dissatisfied, all the judgment creditors ('JC') (appellants in the other four appeals) appealed against this decision. The appeals were dismissed, but the learned judge varied the conditional order to payment of RM10,000 per month for a period of ten years. The bankrupt appealed against the judge's decision while the four JCs further appealed against the discharge order. Hence, the present five appeals. The bankrupt filed his application for a discharge under s. 33 only two years and ten months after the date of adjudication order made against him. The amount of unsettled debts at the relevant time was RM20,336,910.46 and the credit balance in the bankrupt's estate was RM37,442.38. The bankrupt's family members agreed to contribute RM200,000 to help partly settle his debts. The total amount of RM237,442.38 was sufficient to declare dividend of 1% only to 32 creditors. The JCs contended that the bankrupt should not have been discharged because the DGI's reports were incomplete and the DGI failed to carry out a proper investigation into the bankrupt's affairs and assets. The JCs also contended that dividend of 1% was manifestly low and did not comply with the provisions of s. 33(4) of the Act, which requires at least 50% dividend to be paid to the creditors.

Held (allowing the four appeals by the JCs; dismissing the bankrupt's appeal)

Per Ramly Ali JCA delivering the judgment of the court:

(1) In an application for discharge, the court shall take into consideration a report of the DGI as to the bankrupt's conduct and affair, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. However, the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge. The purpose of the DGI report is to secure a full and complete investigation and disclosure of all the material facts or information relating to the bankruptcy particularly on issues stipulated under s. 33(4) and (6) of the Act. (paras 12 & 13)

(2) The DGI's report was both brief and incomplete. There was contradiction in the reports prepared by the DGI as to the income of the bankrupt. The particulars of the bankrupt's income after the discharge were also doubtful. There were a number of questions that needed to be answered in the reports. (para 17)

(3) The bankrupt is required under s. 16(2)(a) of the Act to submit his statement of affairs to the DG1 within seven days from being adjudged a bankrupt. However, the bankrupt had only filed his statement of affairs with the DGI about three months after the date of the adjudication. The bankrupt had committed an offence under s. 16(2) punishable under s. 16(3) of the Act. Yet, the DGI in his reports had the audacity to state that "the bankrupt did not commit any offence under the Act". (para 37)

(4) Section 33(6) provides for 13 factual situations which the existence of any one of them could bar the court from granting an order for discharge or to suspend the operation of such order. All the 13 facts must be fully investigated by the DGI before coming out with any finding whether those facts exist or not. A general statement to the effect that "none of the facts under s. 33(6) of the Act exist (as found in the DGI's report) is clearly insufficient if there is no proper and complete investigation being carried out on each and every situation listed under paras. (a) to (m). (paras 29, 30 & 31)

(5) The bankrupt had delayed or put his creditors to unnecessary expense by frivolous or vexatious defence to various actions or other legal proceedings properly brought or instituted by some of the creditors against him. This showed that a factual situation under s. 33(6)(f) of the Act already existed at the time of the application. The bankrupt only had furniture worth RM2,000 at the time of his adjudication. This clearly was not enough to declare a dividend of 50% on the debts proved in his bankruptcy. Therefore, a factual situation under s. 33(6)(b) of the Act existed. The factual situation under s. 33(6)(m) was also applicable to the facts of the case. (paras 32, 33, 34, 35, 36, 41 & 42)

(6) In considering the question of the bankrupt's discharge, the court was bound to have regard not only to the interest of the bankrupt or of the creditors alone, but also to the interest of

A the public, and of commercial morality. A discharge may be refused where the bankrupt has been guilty of misconduct in a trade (although not guilty of any specific offences mentioned in s. 33 of the Act). A man who finds himself insolvent ought not to continue to do business in the hope of righting himself.
B (para 43)

Bahasa Malaysia *Translation Of Headnotes*

Atas permohonannya, satu perintah penerimaan dan perintah
C penghakiman dibuat terhadap si bankrap pada 23 November 2000. Seterusnya, pada 3 Jun 2003, si bankrap memfailkan permohonan untuk perintah pelepasan di bawah s. 33 Akta Kebankrapan 1967 ('Akta'). Untuk memudahkan pemutusan permohonan tersebut tiga laporan di bawah s. 33(3) Akta 1967 disediakan oleh Ketua
D Pengarah Insolvensi ('KPI'). Timbalan Pendaftar memberi pelepasan bersyarat tertakluk kepada si bankrap membayar jumlah RM5,000 setiap bulan selama lima tahun. Tidak puas hati, semua pemiutang penghakiman (perayu-perayu di dalam empat rayuan yang lain) merayu terhadap keputusan ini. Rayuan-rayuan ditolak, tetapi yang
E arif Hakim telah meminda perintah syarat kepada bayaran RM10,000 setiap bulan selama 10 tahun. Si bankrap merayu terhadap keputusan Hakim dan keempat-empat pemiutang penghakiman merayu terhadap perintah pelepasan. Oleh itu, kelima-lima rayuan tersebut. Si bankrap memfailkan permohonannya untuk pelepasan di
F bawah s. 33 dua tahun dan sepuluh bulan selepas tarikh perintah penghakiman dibuat terhadapnya. Jumlah wang yang masih dihutang pada masa yang relevan tersebut adalah RM20,336,910.46 dan baki kredit di dalam estet si bankrap adalah RM37,442.38. Ahli keluarga si bankrap bersetuju untuk memberi RM200,000 supaya dapat
G menolong menyelesaikan sebahagian dari hutangnya. Jumlah sepenuh RM237,442.38 adalah mencukupi untuk membuat deklarasi dividen 1% kepada 32 pemiutang. Pemiutang-pemiutang penghakiman berhujah bahawa si bankrap tidak sepatutnya dilepaskan kerana laporan-laporan KPI tidak sempurna dan KPI gagal
H menjalankan siasatan sepenuhnya terhadap urusan-urusan dan aset-aset si bankrap. Pemiutang-pemiutang penghakiman juga berhujah bahawa dividen 1% adalah terlalu rendah dan tidak memenuhi keperluan peruntukan s. 33(4) Akta, yang memerlukan 50% dividen untuk dibayar kepada pemiutang-pemiutang.

I

Diputuskan (membenarkan keempat-empat rayuan oleh pemiutang-pemiutang penghakiman; menolak rayuan si bankrap) Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Di dalam permohonan untuk pelepasan, mahkamah mesti mengambil dalam pertimbangan laporan KPI mengenai tingkah laku dan urusan-urusan si bankrap, termasuk laporan mengenai tingkah laku si bankrap semasa prosiding kebankrapannya. Ini adalah keperluan yang mandatori. Walaubagaimanapun, mahkamah ini tidak terikat untuk menerimanya jikalau mahkamah berpuas hati bahawa laporan adalah tidak sempurna dan tidak boleh dirujuk atau dibuat berdasarkan siasatan yang tidak lengkap ke atas tingkah laku dan urusan-urusan si bankrap. Tanpa laporan yang sempurna atau lengkap oleh KPI, mahkamah tidak boleh memutuskan isu pelepasan. Tujuan laporan KPI adalah untuk menjaminkan siasatan yang penuh dan lengkap dan pendedahan fakta-fakta yang material atau maklumat berhubungan kebankrapan terutama sekali atas isu-isu yang dinyatakan di bawah s. 33(4) dan (6) Akta.

(2) Laporan KPI adalah pendek dan tidak lengkap. Terdapat percanggahan di dalam laporan-laporan yang disediakan oleh KPI mengenai pendapatan si bankrap. Butir-butir pendapatan si bankrap selepas pelepasan adalah meragui. Terdapat beberapa persoalan yang memerlukan jawapan di dalam laporan-laporan.

(3) Si bankrap diperlukan di bawah s. 16(2)(a) Akta untuk mengemukakan penyataan urusan-urusannya kepada KPI dalam tujuh hari dari diisytiharkan bankrap. Walaubagaimanapun, si bankrap memfailkan penyataan urusan-urusannya dengan KPI tiga bulan selepas tarikh penghakiman. Si bankrap telah melakukan kesalahan di bawah s. 16(2) yang boleh dihukum di bawah s. 16(3) Akta. Tetapi, KPI dalam laporannya mempunyai keberanian menyatakan bahawa 'si bankrap tidak melakukan apa-apa kesalahan di bawah Akta.'

(4) Seksyen 33(6) memberi 13 situasi faktual di mana kewujudan salah satu darinya boleh menghalang mahkamah dari memberi perintah untuk pelepasan atau untuk menggantung operasi perintah sebegitu. Semua 13 fakta-fakta mestilah disiasat oleh KPI sebelum mengeluarkan apa-apa keputusan sama ada fakta-fakta tersebut wujud atau tidak. Penyataan am seperti tidak ada fakta-fakta di bawah s. 33(6) Akta wujud (seperti yang ditemui

di dalam laporan KPI) dengan jelasnya tidak memadai jika tidak terdapat siasatan yang sempurna dan lengkap ke atas setiap situasi yang disenaraikan di bawah para. (a) ke (m).

(5) Si bankrap telah lewat ataupun telah menyebabkan pemiutang-pemiutang berbelanja tanpa sebab dengan pembelaan yang menyusahkan dan remeh terhadap guaman-guaman atau prosiding undang-undang yang telah dilaksanakan terhadapnya oleh pemiutang-pemiutang. Ini menunjukkan situasi faktual di bawah s. 33(6)(f) Akta sudah wujud pada masa permohonan. Si bankrap hanya memiliki perabot berharga RM2,000 pada masa penghakiman. Ini jelasnya tidak cukup untuk membuat deklarasi dividen 50% atas hutang-hutang yang dibuktikan dalam kebankrapannya. Oleh itu, situasi faktual di bawah s. 33(6)(b) Akta wujud. Situasi faktual di bawah s. 33(6)(m) juga digunapakai kepada fakta-fakta kes.

(6) Dalam mempertimbangkan persoalan mengenai pelepasan si bankrap mahkamah terikat untuk mengambilkira bukan hanya kepentingan si bankrap atau pemiutang-pemiutang sahaja, tetapi juga kepentingan orang awam, dan prinsip-prinsip komersial. Pelepasan boleh ditolak di mana si bankrap melakukan salahlaku di dalam perniagaan (walaupun beliau tidak bersalah dalam melakukan kesalahan-kesalahan spesifik yang disebut di dalam s. 33 Akta). Seseorang yang mendapati dirinya tak solven tidak sepatutnya menyambung perniagaannya supaya beliau boleh memperbetulkan diri sendiri.

Case(s) referred to:

Dato' Abdullah Hishan Hj Mohd Hashim v. Sharma Kumari Shukla (No 4) [2001] 5 CLJ 400 HC ***(refd)***

Re Badcock [1889] 3 Mor 138 DC ***(refd)***

Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Re Matheson [1862] 31 LJ Bcy 23 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 16(2)(a), (3), 17, 31, 33(1), (3), (4), (6)(a), (b), (f), (m), (8), (12), 72

Other source(s) referred to:

*English and Empire Diges*t, vol 4, 1970 Reissue, p 590 paras 5229

For the bankrupt - Teja Singh; M/s Teja Singh Penasar & Co
For the OCBC Bank - SC Tan; M/s Cheong Wai Meng & Van Buerle
For the Allianz General Insurance Company (M) - Yuslinov Ahmad; M/s Yuslinov Ahmad & Petra Oon

For the Overseas Assurance Corporations (M) Bhd - BK Cheah; M/s See, Ramsun & Tan
For the Hong Bee Hardware Co Sdn Bhd - Geetar Kaur; M/s Hassan Subra & Assocs

[Appeal from High Court, Pulau Pinang; Bankruptcy No: 29-3106-2000 (MT3)]

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali JCA:

[1] There are five related appeals being heard together. The first appeal (No. P-03-125-07) is by the bankrupt against part of the decision of the learned High Court judge dated 25 June 2007 whereby he was ordered to pay a monthly sum of RM10,000 for a period of ten years as a condition of him being discharged as a bankrupt. The other four appeals (No. P-03-137A-07; P-03-146-07; P-03-172-07 and P-02-624-07) are by the respective judgment creditors (JC) namely OCBC Bank (M) Bhd, Allianz General Insurance Co (M) Bhd, Hong Bee Hardware Sdn Bhd and Overseas Assurance Corporation (M) Bhd. Their appeals are against the decision of the learned High Court judge dated 25 June 2007 in affirming the earlier decision of the Deputy Registrar of the High Court in granting a conditional discharge of bankruptcy in favour of the bankrupt.

Factual Background

[2] On his own application, a receiving order and adjudication order were made against the bankrupt on 23 November 2000.

[3] Subsequently, on 3 June 2003, the bankrupt filed an application for an order of discharge under s. 33 of the Bankruptcy Act 1967. To facilitate the determination of the said application three reports pursuant to s. 33(3) of the Bankruptcy Act 1967 were prepared by the Director-General of Insolvency (DGI) namely report dated 26 January 2004, additional report dated 12 May 2004 and another additional report dated 2 August 2004.

[4] On 23 August 2004, the learned deputy registrar granted a conditional discharge subject to the bankrupt being made to pay a sum of RM5,000 per month for a period of five years.

[5] Being dissatisfied, all the judgment creditors (appellants in the other four appeals) appealed to the judge-in-chamber against the said decision of the learned deputy registrar. On 25 June 2007 the said appeals were dismissed, but the learned judge varied the conditional order to payment of RM10,000 per month for a period of ten years.

[6] The bankrupt was not satisfied with the variation of the conditional order requiring him to pay a sum of RM10,000 per month for a period of ten years; while all the four JCs were not satisfied with the discharge order. Hence, the five appeals before this court.

[7] It is pertinent to note that the bankrupt filed his application for a discharge under s. 33 of the Bankruptcy Act 1967 only two years and ten months after the date of adjudication order made against him. According to the additional DGI's report dated 12 May 2004, the amount of unsettled debts at the relevant time was RM20,336,910.46. The credit balance in the estate of the bankrupt at the material time was RM37,442.38. On top of that, the family members of the bankrupt have agreed to contribute a sum of RM200,000 to help the bankrupt to partly settle the debts. The total amount of RM237,442.38 is sufficient to declare dividend of 1% only to 32 creditors who had filed their proof of debts with the DGI.

[8] In their appeals, the judgment creditors contend that the bankrupt should not have been discharged of his bankruptcy mainly on the ground that the reports by the DGI are incomplete and the DGI has failed to carry out a proper investigation into the bankrupt's affairs and assets. The judgment creditors also contend that dividend of 1% to be paid to the 32 creditors for the discharge is manifestly low and does not comply with the provisions of s. 33(4) of the Bankruptcy Act 1967, which requires at least 50% dividend to be paid to the creditors. In general, all the judgment creditors in their appeals submit that this is not an appropriate case for the learned judge to exercise his discretion to discharge the bankrupt.

[9] The bankrupt on the other hand contends that the decision of the learned judge to discharge him from his bankruptcy is correct on the ground that the main objective of bankruptcy is to relieve the bankrupt from his debts and to enable him to make a fresh start as soon as he is discharged by the court. The bankrupt further contends that it is against public interest for an individual to remain a bankrupt and such situation is of no benefit to anyone.

Findings Of Court

[10] The application by the bankrupt for a discharge in the present case was made under s. 33 of the Bankruptcy Act 1967. Section 33(1) of the Act provides that a bankrupt may at any time after being adjudged bankrupt applies to the court for an order of discharge and the court shall appoint a date for the hearing of the application.

[11] Upon hearing the application the court may grant or refuse an absolute order of discharge; or grant a conditional discharge. Section 33(3) of the Act provides:

> (3) On the hearing of the application the court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[12] In dealing with the application for discharge the court shall take into consideration a report of the DGI as to the bankrupt's conduct and affair, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. Thus, in an application of this nature, a report of the DGI is very vital, in fact the most important consideration. Even though the court shall consider the DGI report as required under s. 33(3), the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge. The purpose of the

DGI report is to secure a full and complete investigation and disclosure of all the material facts or information relating to the bankruptcy particularly on issues stipulated under s. 33(4) and (6) of the Act. The report is not only for the interest of the bankrupt and the creditors but also the interest of the public as well as the business community at large.

[13] In law, the DGI is duty bound to carry out a complete and efficient investigation. The report produced must be fair and not bias for or against the bankrupt or the creditors. This is in line with his duties entrusted upon him under s. 72 of the Act, which provides:

> (72). As regards the debtor, the Director General of Insolvency shall:
>
> (a) investigate the conduct of the debtor, and report to the court stating whether there is reason to believe that the debtor has committed any act which constitutes an offence under this Act or under sections 421, 422, 423 or 424 of the Penal Code or which would justify the court in refusing, suspending or qualifying an order for his discharge;
>
> (b) make such other reports concerning the conduct of the debtor as the court directs or as may be prescribed;
>
> (c) take such part as may be directed by the court or prescribed in the public examination of the debtor;
>
> (d) take such part and give such assistance in relation to the prosecution of any fraudulent debtor or any other person charged with an offence under this Act, as the Public Prosecutor may direct.

[14] The DGI is empowered to carry out his duties under the Act for the purpose of securing full and complete investigations into the affairs and conduct of a bankrupt. Section 17 of the Act empowers the DGI to make an application to the court to hold public examination of the bankrupt to be examined as to his conduct; dealing and property. During such examination, any creditor who has tendered a proof of debt or his representative authorized in writing may question the bankrupt concerning his affairs and conduct. The DGI shall also take part in the examination. The court may also put such question to the bankrupt as it thinks

expedient. The bankrupt shall be examined upon oath, and it shall be his duty to answer all such questions as the court puts or allow to be put to him.

[15] In appropriate cases, an examination of the bankrupt may be followed by the process of discovery of the bankrupt's property under s. 31 of the same Act where the bankrupt's wife (or husband) or any person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt or supposed to be indebted to the bankrupt or any person whom the court deems capable of giving information respecting the bankrupt, his dealings or property may be summoned before the court.

[16] The bankrupt in an application for a discharge cannot be allowed to obtain undue advantage of the weaknesses in the DG1's incomplete report. To borrow the words of Ian Chin J in the case of *Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960, "the OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away, whether in his name or in the name of his wife or children, as otherwise people will be imbued with the message that money borrowed could be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off of the creditor then cases of borrowers not repaying and not minding to be made bankrupt would be the rule rather than the exception. Then, business morality would decline".

[17] In the present case, it is noted that the DGI's report is both brief and incomplete. Three reports were prepared by the DGI, dated 26 January 2004, 12 May 2004 and 2 August 2004 respectively. The two additional reports were prepared after hearing arguments or objections raised by the creditors. The fact that three reports were prepared by the DGI during the hearing of the discharge application shows that it was not a thorough investigation by the DGI's officer.

[18] Further, from the reports it was stated that the bankrupt paid RM500 per month to the DGI since Mac 2001 but subsequently the monthly payment was increased to RM1,000 since May 2002. There is no mention of the bankrupt having any other means of income besides what he had disclosed. The monthly expenses of the bankrupt were not mentioned in the reports. However, taking into

account of the monthly expenses disclosed subsequently (at the application for stay of High Court judge order) the monthly expenses of the bankrupt is around RM5,200 per month without taking into account deductions of the EPF and monthly income tax. In addition, how could the bankrupt pay RM500 per month since Mac 2001 but only started work on 1 January 2002 with BTQ Sdn Bhd as "Chief Operating Officer"?

[19] There is contradiction in the reports prepared by the DGI as to the income of the bankrupt. At para. 16 of the first report, it was stated that the bankrupt earned RM3,500 per month and paid RM1,000 monthly to the DGI. Whereas at para. 4 of the additional report no. 2, it was stated that the bankrupt earned RM3,000 per month since 1 January 2002.

[20] The particulars of the bankrupt's income after the discharge are also doubtful. From the particulars of account furnished by the DGI, it seems that the bankrupt was not earning RM10,000 per month after the discharge but at least RM19,300 per month for the month of December 2005, Mac 2006, June 2006, February 2007, April 2007 and May 2007. However at all times until today, the bankrupt is maintaining that he earns RM10,000 or slightly more just enough for the monthly expenses of RM10,200 per month. Prudent calculation would lead to a conclusion that he is earning more than RM19,300 per month. He alleges that he only earns RM10,000 per month, and no mention of any side income, then the assumption is that there is some money stashed away but not disclosed to the DGI.

[21] There is also no investigation as to the payment of RM200,000 by his relative into the account with the DGI should the conditional discharge is allowed by court. The DGI should have investigated the truth of the statement in detail, and not to rely solely on the statement of the bankrupt.

[22] Further it was stated in the report dated 26 January 2004 that the bankrupt stayed with his mother in an apartment at Jalan Kelawai, Pulau Pinang owned by his mother. But in the additional report no. 2, it is stated that the apartment was owned by a company known as Mega Pesona Sdn Bhd in which his mother was a majority shareholder with four shares out of a total of seven shares at RM1 per share. How could a company with RM7 paid up

capital own an apartment at Jalan Kelawai? Further, the deed of assignment for the said apartment shows that the original buyer of the apartment was the bankrupt and then it was subsequently sold to Mega Pesona Sdn Bhd.

[23] There should be an investigation by the DGI of the payment of RM200,000 by the relative of the bankrupt and the apartment owned by Mega Pesona Sdn Bhd to ensure that the bankrupt has no hidden assets stashed away whether in his name or others.

[24] The bankrupt alleged that he pays monthly alimony to his former wife and maintenance to his child of RM1,200 but the document showed otherwise. According to the additional report no. 2, there is no such settlement of assets or alimony of maintenance during the joint petition for divorce.

[25] The bankrupt further alleged that he pays a monthly house rental of RM1,000 but nowhere mentioned in the reports that he paid such a rental. In fact, according to the reports, the bankrupt was staying with his mother at his mother's company owned apartment.

[26] If the payment of RM1,200 to his former wife and house rental of RM1,000 is true, then the monthly expenses at the time of his alleged salary of RM3,500, would be more than RM3,500, taking into account of his monthly payment of RM1,000 to the DGI, personal expenses of RM800 and of course for EPF and monthly income tax deduction.

[27] There are a number of questions that need to be answered in the reports. There are also a number of re-calculations to be made in respect of the actual income and expenses of the bankrupt. Those questions can only be answered and clarified satisfactorily if the DGI had carried out a proper, thorough and complete investigation of the full affairs and conduct of the bankrupt.

[28] Under s. 33(4) of the Bankruptcy Act 1967, on proof of any of the facts mentioned in sub-s. (6) the court shall either refuse the order for discharge; or suspend the operation of the order for a specified time; or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors; or grant an order of discharge subject to such conditions as aforesaid.

[29] Sub-section (6) provides for 13 factual situations (ie, sub-s. (6)(a-m) which the existence of any one of them could bar the court from granting an order for discharge or to suspend the operation of such order. All the 13 facts must be fully investigated by the DGI before coming out with any finding whether those facts do exist or not. A general statement to the effect that "none of the facts under s. 33(6) of the Act exist (as found in the DGI's report) is clearly insufficient if there is no proper and complete investigation being carried out on each and every situation listed under paras. (a) to (m).

[30] The court is aware that on the hearing of an application for an order of discharge, the court shall take into consideration a report by the DGI. This is a mandatory requirement. However, it does not mean that the court is bound to accept the statements therein contained. No doubt sub-s. (8) of s. 33 provides that for the purpose of an application for a discharge the DGI's report shall be *prima facie* evidence of the statements contained therein; but the court is duty bound to scrutinise the truth and reliability of the statements and in appropriate case, when the court is satisfied that the report is incomplete and misleading, the court is not bound to accept the statements contained in the report. This is particularly so, as in the present case, where the amount of debts involved are huge (about RM25 million); bearing in mind the bankruptcy was initiated by the bankrupt himself (not by any of the creditors); the application for an order of discharge was only filed two years ten months after the AORO was granted; and the dividend declared is only 1% of the total debts. The status of "*prima facie*" evidence as provided under sub-s. (8) is rebuttable, and not conclusive.

[31] Under s. 33(6)(a), the DGI is duty bound to specifically investigate and ascertain the fact whether the bankrupt has omitted to keep such books of account as to sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or within such shorter period immediately preceding that event as the court deems reasonable in the circumstances. In the present case, the DGI reports fail to touch on this matter. No indication to show that an investigation was specifically done on this matter. No mention of the bankrupt's financial affairs and business transactions carried out during the three years period immediately preceding the granting of the bankruptcy order. This is a gross insufficiency that would badly affect the reliability of the DGI reports.

[32] The court finds that the bankrupt has delayed or put his creditors to unnecessary expense by frivolous or vexatious defence to various actions or other legal proceedings properly brought or instituted by the some of the creditors against him. This can be seen from the defence and appeal filed by him. In his defence, it was alleged that he was never a guarantor and never signed the guarantee for the principal borrower. In the defence of the principal borrower (where the bankrupt was the operating mind) the principal borrower also denied having taken any loan or signed any securities document. Yet, after the adjudication he submitted the debts to the DGI including the debts to the appellants. This goes to show that a factual situation under s. 33(6)(f) of the Act already existed at the time of the application.

[33] For the purpose of an application for an order of discharge under s. 33, there is a presumption created under sub-s. (12) ie, if at anytime after the expiration of six months from the date of the adjudication the DGI reports to the court that the value of the assets which have been realized, together with the estimated value of the assets which are realizable, is insufficient to pay a dividend of 50% on the debts proved in the bankruptcy, it shall be presumed, until the contrary is proved, that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent.

[34] According to the DGI's first report, which was made after the period of six months from the date of his adjudication, the bankrupt only has furniture worth RM2,000 at the time of his adjudication. This clearly was not enough to declare a dividend of 50% on the debts proved in his bankruptcy. Thus the above presumption applies ie, "he has continued to trade after knowing or having reason to believe himself to be insolvent". There is no contrary evidence adduced, either by the bankrupt himself or the DGI reports. Therefore, a factual situation under s. 33(6)(b) of the Act exists.

[35] The court is also of the view that the factual situation under s. 33(6)(m) is also applicable to the facts of the present case ie, that the bankrupt's assets are not of a value equal to 50% of the amount of his unsecured liabilities, unless he satisfies the court that the assets are not of a value equal to 50% of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot justly be held blameable.

[36] The fact that the bankrupt's assets (realised and likely to be realised) are not of a value equal to 50% of the amount of his unsecured liabilities in the present case is not in dispute. The bankrupt has failed to satisfy the court that the fact that the assets are not of such a value has arisen from circumstances for which he cannot justly be held blameable. The DGI's reports on this issue are of not much help either. The DGI has failed to highlight this matter satisfactorily in his three reports.

[37] Section 33(4) of the Act *inter alia* provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors but the DGI may for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension. In the present case the adjudication order was made on 23 November 2000, on the bankrupt's own application (not by any creditors). The bankrupt is required under s. 16(2)(a) of the Act to submit his statement of affairs with the DG1 within seven days from his being adjudged bankrupt. However, the bankrupt in the present case only filed his statement of affairs with the DGI on 21 February 2001, about three months after the date of the adjudication. There is no mention in the DGI's reports that an extension of time has been granted to the bankrupt to file the statement of affairs out of time or any reasonable explanation or excuse by the bankrupt for his delay in filing the statement of affairs in the DGI's reports; and yet the DGI in his reports states that the bankrupt did not commit any offence under the Act.

[38] Section 16(3) of the Act provides that if the bankrupt fails, without reasonable excuse, proof whereof shall lie on him, to comply with the requirement, he shall be guilty of contempt of court and may be punished accordingly. The court has treated such non-compliance of s. 16(3) of the Act as very serious and had imposed custodial sentence on the bankrupt (see: *Dato' Abdullah Hishan Hj Mohd Hashim v. Sharma Kumari Shukla (No 4)* [2001] 5 CLJ 400). Thus, there is no doubt that a contempt of court action under s. 16(3) is an offence under the Act. The bankrupt in this present case has clearly committed an offence under s. 16(2) punishable under s. 16(3) of the Act. Yet, the DGI in his reports had the audacity to state that "the bankrupt did not commit any offence under the Act".

[39] That being the case, the court should have refused the conditional discharge or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors, as clearly stipulated by the first limb of s. 33(4) of the Act. There is no special reason otherwise determined by the court on this matter and the 1% dividend declared was manifestly below the minimum requirement of 50% under the said provisions.

[40] The learned counsel for the bankrupt submitted that the bankrupt should be discharged on the ground that on giving up the whole of his property, he shall be a free man again, able to earn his livelihood and having the ordinary inducement to industry. He further submitted that where it is against public interest for an individual to remain a bankrupt and such situation is of no benefit to any one, an order for discharge should be made.

[41] In this respect the court cannot agree fully with the learned counsel's submission. The court is of the view that in considering the question of bankrupt's discharge the court is bound to have regard not only to the interest of the bankrupt or of the creditors alone, but also to the interest of the public, and of commercial morality. (see: *English and Empire Digest*, Vol: 4, 1970 Reissue, p. 590 paras 5229)

[42] In an application for a discharge, each case has to depend upon its own individual circumstances (see: *Re Matheson* [1862] 31 LJ Bcy 23). The DGI's report is very essential to assist the court in its consideration and determination. Without a proper and complete report on all the relevant issues the court will not be able to exercise its judicial discretion. Thus, in preparing the report, the DGI must appreciate the importance of his investigations and report, failing which the report would be unreliable and the application by the bankrupt for a discharge would ultimately be refused.

[43] The court agrees that in some appropriate cases, an individual should not remain a bankrupt and he should be able to make a fresh start as soon as he is discharged by the court. On the other hand, the court also appreciates that in bankruptcy matters, the DGI must investigate into the reason for the bankrupt's insolvency so that the interest of the creditors and the public are protected. A discharge may be refused where the bankrupt has been guilty of

misconduct in a trade (although not guilty of any specific offences mentioned in s. 33 of the Act). A man who finds himself insolvent ought not to continue to do business in the hope of righting himself. He is not carrying on business at his own risk, but at the risk of innocent persons who knows nothing about his condition. (see: *Re Badcock* [1889] 3 Mor 138 DC as reported in *William, Law and Practice In bankruptcy* - 18th edn).

[44] In appropriate and deserving case, a bankrupt may be discharged from his bankruptcy, but not at the expense of commercial morality and public perception on bankruptcy law in the country. In allowing a discharge, the court must be very cautious in balancing between the interest of the bankrupt as an individual and the interest of the public and commercial reality at large. The application for a discharge can easily be abused especially in cases where the DG1 has failed to carry out proper and complete investigation into the affairs of the bankrupt. There must be full and frank disclosure of all the relevant and material facts in the DG1's reports.

[45] It must be noted that in the interest of the public, commercial morality must be preserved at its highest level at all times. Bankruptcy law should not be used to defeat this goal. An order for a discharge should not be granted easily without proper and complete investigation into the affairs of the bankrupt. The public as well as commercial players should not be imbued with the perception that a person can easily borrow money (even in big amount) from financial institutions or create debts with other business creditors, then stash the money away, whether in his own name or any other persons and need not be repaid; then personally apply for a bankruptcy order against him (as in the present case) and after a short period apply for an order for a discharge with a minimum or too little dividend to be paid to the creditors, and after the discharge he can enjoy a luxury life. If this practice and perception is not checked, then commercial morality would decline. In this type of fiasco, the court and the DGI should be blamed for not carrying out their duties effectively under the bankruptcy law.

Conclusion

[46] Based on the above considerations, this court finds that it is unsafe to adopt and rely on the reports prepared by the DGI especially when there seems to be no proper and complete investigation as to the assets, income and expenses of the bankrupt. The reports contain contradictions, brief in nature and thus unreliable. To allow an order for a discharge of the bankrupt in the present circumstances would make a mockery of the provisions of the bankruptcy law available to safeguard the interest of creditors. It will not only lead to a decline in business morality but will also result in great injustice to legitimate creditors.

[47] For all the above reasons, this court unanimously allows all the four appeals by the judgment creditors, namely appeals no. P-03-137A-2007, P-03-146-2007, P-03-172-2007 and P-02-624-2007, with no order as to costs. Deposits to be refunded to the respective judgment creditors. Consequentially, the bankrupt's appeal *vide* appeal no. P-03-125-2007 is dismissed with also no order as to costs. Deposits to be paid to the DGI.